

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34917

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| STATE OF IDAHO, |) | 2009 Unpublished Opinion No. 487 |
| |) | |
| Plaintiff-Respondent, |) | Filed: June 4, 2009 |
| |) | |
| v. |) | Stephen W. Kenyon, Clerk |
| |) | |
| RUSSELL A. MERRIFIELD, JR., |) | THIS IS AN UNPUBLISHED |
| |) | OPINION AND SHALL NOT |
| Defendant-Appellant. |) | BE CITED AS AUTHORITY |
| |) | |

Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. Lansing L. Haynes, District Judge.

Judgment of conviction, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Russell A. Merrifield appeals from the judgment of conviction entered upon the jury verdict finding him guilty of driving under the influence. We affirm.

I.

BACKGROUND AND PROCEDURE

Merrifield was stopped by Sandpoint Police Officer Dave Giffin after Officer Giffin observed Merrifield fail to stop at a red stoplight. When he approached Merrifield in his car, Officer Giffin noticed Merrifield had bloodshot and watery eyes, slurred speech, and the odor of alcohol coming from his truck. Consequently, Officer Giffin turned the case over to Officer Chris Geise, a specialized DUI officer. Following Merrifield's failure of all field sobriety tests administered by Officer Geise, Merrifield was arrested for driving under the influence and taken to the Sandpoint Police Department. Once there, Merrifield refused to take a breath test.

Merrifield was charged with driving under the influence, Idaho Code §§ 18-8004(1)(a) and 18-8005(5). Following a trial, the jury found Merrifield guilty of driving under the influence and Merrifield pled guilty to felony enhancement. The district court imposed a unified sentence of five years with one year determinate. This appeal followed.

II.

ANALYSIS

Merrifield contends that his right to a fair trial was violated by prosecutorial misconduct, specifically, that the prosecutor vouched for the credibility of Officer Geise during redirect and closing arguments. In addition, Merrifield argues that even though his trial counsel did not object to the statements of the prosecutor, thus failing to preserve the issue for appeal, this Court should, nonetheless, consider the issue on appeal as fundamental error. Merrifield claims that the statement made by the prosecutor was fundamental error because it had the effect of violating his right to a fair trial.

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.*; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Phillips*, 144 Idaho at 86, 156 P.3d at 587.

Closing argument should not include counsel's personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also State v. Garcia*, 100 Idaho 108, 110-11, 594 P.2d 146, 148-49 (1979); *State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995); *State v. Ames*, 109 Idaho 373, 376, 707 P.2d 484, 487 (Ct. App. 1985). A prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence, but the prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial. *Phillips*, 144 Idaho at 86 n.1, 156 P.3d at 587 n.1. The safer course

is for a prosecutor to avoid the statement of opinion, as well as the disfavored phrases “I think” and “I believe” altogether. *Id.*

Appeals to emotion, passion, or prejudice of the jury through the use of inflammatory tactics are impermissible. *Phillips*, 144 Idaho at 87, 156 P.3d at 588. *See also State v. Raudebaugh*, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *State v. Pecor*, 132 Idaho 359, 367, 972 P.2d 737, 745 (Ct. App. 1998). The prosecutor’s closing argument should not include disparaging comments about opposing counsel. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also Sheahan*, 139 Idaho at 280, 77 P.3d at 969; *State v. Brown*, 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct. App. 1998); *State v. Baruth*, 107 Idaho 651, 657, 691 P.2d 1266, 1272 (Ct. App. 1984).

While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he or she is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.*

When there is no contemporaneous objection, a conviction will be reversed for prosecutorial misconduct only if the conduct is sufficiently egregious so as to result in fundamental error. *Id.* Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. *State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003). However, even when prosecutorial misconduct has resulted in fundamental error, the conviction will not be reversed when that error is harmless. *Field*, 144 Idaho at 571, 165 P.3d at 285. The test for whether prosecutorial misconduct constitutes harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *State v. Pecor*, 132 Idaho 359, 368, 972 P.2d 737, 746 (Ct. App. 1998).

When the defendant did not object at trial, our inquiry is, thus, three-tiered. *See Field*, 144 Idaho at 571, 165 P.3d at 285. First, we determine factually if there was prosecutorial misconduct. Second, if there was prosecutorial misconduct, we determine whether the misconduct rose to the level of fundamental error. Third, if we conclude that it did, we then

consider whether such misconduct prejudiced the defendant's right to a fair trial or whether it was harmless.

At trial, Officer Geise explained his training, experience, and qualification as a Selective Traffic Enforcement Patrol Officer and testified that during his contact with Merrifield, Merrifield appeared to be under the influence and failed all three field sobriety tests. On cross-examination, defense counsel asked whether other factors could hinder one's performance in a field sobriety test and further questioned whether Officer Geise had ever mistakenly arrested someone for driving under the influence. Officer Geise admitted that he had made mistakes. During redirect, Officer Geise explained that his mistakes occurred when arresting someone on suspicion of driving under the influence and the person later tested under .08 blood/alcohol content, which could be the result of "dissipation" of the alcohol into the system. Additionally, Officer Geise testified such detainees could be "impaired" without being over the .08 legal blood/alcohol limit.

Merrifield alleges the first instance of vouching occurred during the following redirect:

Prosecutor: So, in essence, you didn't make a mistake in the determination?

Officer Geise: No. My determination was correct, I believe.

Prosecutor: And having had the experience of reviewing this, having had the experience of testifying to counsel's questions on cross-examination, is there any doubt in your mind about whether or not you made the right call with respect to Mr. Merrifield's impairment because of the consumption of intoxicants that night?

Officer Geise: I have no doubt in my mind that I made the correct decision in removing him from the roadway that evening.

As noted, on cross-examination, Merrifield's counsel asked Officer Geise whether he had ever made an error in interpreting someone's behavior. During this redirect, the prosecutor responded to this line of questioning by asking additional questions regarding Officer Geise's assessment of Merrifield's impairment. The prosecutor's questioning served only to give the officer the opportunity to restate his belief that he had made a correct assessment, did not include the prosecutor's personal opinion as to credibility and did not constitute vouching.

Merrifield alleges the second instance of vouching took place during the following closing argument:

By Mr. Merrifield's own testimony yesterday he acknowledged that he did poorly on those field sobriety evaluations so there's no question that the officer's conclusions about whether or not there was evidence that Mr. Merrifield was impaired were accurate. The issue then becomes whether the officer's conclusion that it was as a result of alcohol consumption was the reason or Mr. Merrifield's story about all of the things that might have affected him was the story that you should believe. As jurors you are the finders of fact. You have to decide whether or not you believe the officer. You have to decide whether or not you want to give sufficient weight to that evidence that you were willing to find Mr. Merrifield guilty. On the other hand, you have to decide in contrast to that evidence whether or not you want to accept as believable the evidence that was offered by the defense. That, Ladies and Gentlemen, is where your deliberations will focus. There isn't any issue about whether or not Mr. Merrifield was operating a motor vehicle on a public highway in the State of Idaho on April 6th of 2007. The only issue in the case is whether or not he was under the influence of intoxicants. And in support of that the State has presented to you the testimony of the two officers who had contact with him. You have seen the tape of the officer's contact so you know exactly what was said by the officer. You were able to observe the officer's demeanor during his contact with Mr. Merrifield. You were able to observe Mr. Merrifield's responses to the officer, his performance on the requested evaluations. And it will be up to you to decide how much weight to give to that evidence. It will be up to you to decide who has offered the more credible, the more reliable information, the kind of information that you would want to rely on to make an important decision like this. This is an important decision. It's an important decision to Mr. Merrifield. It's an important decision to the State of Idaho. So what I'm asking you to do is think about all of these issues that are related to what version of this story you want to believe. There is no reason to question the information that Officer Geise presented to you from the stand yesterday, but there is a lot of reason to question the information that Mr. Merrifield shared with you.

The first thing you need to remember is that Mr. Merrifield has an interest in the outcome of this case. Much more than Officer Geise who is just doing his job. That was just one evening, one shift that he worked. As you can see he is still an officer. He is still doing the same thing now that he was doing that night. So he doesn't have the vested interest in the outcome of this case that Mr. Merrifield does.

Merrifield placed the credibility of himself and the arresting officer at issue. At trial, Merrifield offered a variety of explanations for his behavior the night he was pulled over—his legs were cold and cramped, he was exhausted, and he was sleep deprived from worrying about his son. Merrifield also claimed a broken clutch caused his failure to stop and that smoke and fumes in the truck were the cause of his bloodshot eyes. Conversely, Officer Geise testified that Merrifield's state of impairment was the result of being under the influence of alcohol. Thus, the

prosecutor was entitled to challenge Merrifield's credibility by pointing out his motive was to obtain a jury finding of not guilty. *See State v. Gross*, 146 Idaho 15, ___, 189 P.3d 477, 482 (Ct. App. 2008).

The prosecutor was entitled to, as he did, remind the jury that it was their job to determine whom to believe. The prosecutor was also entitled to comment on facts in the record supporting the officer's credibility. *Id.* However, in an effort to compare Merrifield's motive and the officer's motive, the prosecutor did refer to facts not in evidence when he stated that Officer Geise was just doing his job, on just another evening, during just another shift and that he was doing the same thing at the time of trial that he was doing the night of the arrest. The prosecutor though did not express a personal opinion about either Officer Geise or Merrifield's testimony. The prosecutor did not, as in *Gross*, claim one person told the truth while the other lied. The prosecutor did not, as in *Gross*, refer to himself and the officer as representatives of the State and repeatedly reference their goal as the "truth" and the goal of the defendant as not guilty. The prosecutor here likewise did not ask the jurors to make their decision upon "the officer's and the prosecutor's self-proclaimed moral rectitude and integrity." *Id.* The prosecutor's statements in closing do not constitute prosecutorial misconduct.

III.

CONCLUSION

Merrifield has failed to demonstrate prosecutorial misconduct much less fundamental error. Therefore, Merrifield's judgment of conviction is affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**